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85-1804

No. 85-

IN THE

Supreme Court of the United States

October Term, 1985

THOMAS WEST,

Petitioner,

v.

CONRAIL, a foreign corporation; BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES, LOCAL 2906, a foreign corporation; NEW JERSEY TRANSIT, a corporation of the State of New Jersey; and ANTHONY VINCENT,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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May 2, 1986

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QUESTION PRESENTED*

Are actions involving the federal duty of fair representation sufficiently unique to warrant creating an exception to the general rule that in federal question cases the filing of a complaint, not completion of service, satisfies the statute of limitations?

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*All parties to the proceeding in the court below are listed in the caption.

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Thomas West petitions the Court to issue a writ of certiorari to the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

The decision of the district court is not reported, and is set forth at pages 14a to 17a of the appendix to this petition ("App. 14a-17a"). The court of appeals' opinion is reported at 780 F.2d 361 and is reprinted at App. 1a to 13a.

JURISDICTION

The judgment of the United States Court of Appeals for the Third Circuit was issued on December 31, 1985. App.18a. On March 27, 1986, Justice Brennan extended the time for filing a petition for the writ of certiorari until May 5, 1986. The Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTE AND RULE INVOLVED

Rule 3 of the Federal Rules of Civil Procedure provides:

A civil action is commenced by filing a complaint with the court.

Section 10(b) of the National Labor Relations Act, 29 U.S.C. § 160(b), provides:

> (b) Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint: Provided, That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made, unless the person aggrieved thereby was prevented from filing such charge by reason of service in the armed forces, in which event the six-month period shall be computed from the day of his discharge. Any such complaint may be amended by the member, agent, or agency conducting the hearing or the Board in its discretion at any time prior to the issuance of an order based thereon. The person so complained of sha'l have the right to file an answer to the original or amended complaint and to appear in person or otherwise and give testimony at the place and time fixed in the complaint. In the discretion of the member, agent, or agency conducting the hearing or the Board, any other person may be allowed to intervene in the said proceeding and to present testimony. Any such proceeding shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States under the rules of civil procedure for the district courts of the United States, adopted by the Supreme Court of the United States pursuant to the Act of June 19, 1934 (U.S.C., title 28, secs. 723-B, 723-C).

STATEMENT

Petitioner Thomas West was employed as a mechanic by respondent Consolidated Rail Corporation ("Conrail"), and was represented in collective bargaining by respondent Local 2906 of the Brotherhood of Maintenance of Way Employees ("Union"). In November, 1981, as petitioner was leaving a company truck in which he had been riding in the back seat, four bottles of beer were found in the front seat. Despite petitioner's spotless record, and his assertion that he was unaware that there had been any beer in the truck, petitioner was fired six days later. Over the next 28 months, petitioner was repeatedly assured by respondent Anthony Vincent, a Union representative, that although the appeal of his termination had been delayed, an appeal was being pursued, and that the Union would obtain both reinstatement and back pay for him. During this time, petitioner accepted an offer of reinstatement from Conrail, but the back-pay issue remained unresolved. On March 25, 1984, petitioner first became aware that, in fact, his union representative was not pursuing the matter, and that there was little, if any, chance that any further appeals would be taken.

On September 24, 1984, petitioner filed a complaint alleging that respondent Conrail discharged him in violation of the collective bargaining agreement, and that respondents Union and Vincent had breached their duty of fair representation by their failure to pursue his grievance. Respondent New Jersey Transit was named as a defendant as a successor in interest to Conrail. The summonses and complaints were mailed to respondents on October 10, 1984, pursuant to Rule 4(c)(2)(C) of the Federal Rules of Civil Procedure, and respondents acknowledged service on dates ranging from October 12, 1984, through November 1, 1984. For the purposes of this proceeding, it is undisputed that

September 24, 1984, when the complaint was filed, was less than six months after the statute of limitations began to run, and that both October 10, when the complaints were mailed, and October 12, when the first acknowledgement was made, were more than six months after the statute began to run.

Respondents moved for summary judgment on the ground that the action was barred by the six-month statute of limitations, borrowed by this Court from section 10(b) of the National Labor Relations Act to govern hybrid actions under the duty of fair representation and section 301 of the Labor-Management Relations Act, 29 U.S.C. § 185. *DelCostello v. Teamsters*, 462 U.S. 151 (1983). Respondents argued, and the district court agreed, that because section 10(b) requires unfair labor practice charges to be served on the respondents, as well as filed with the National Labor Relations Board, within six months, a fair representation complaint must also be served on all defendants as well as filed with the district court within the limitations period. App. 17a.

A divided panel of the Court of Appeals for the Third Circuit affirmed. The majority recognized that the general rule for federal question lawsuits is that the action is commenced, and the statute of limitations tolled, by filing the complaint. It noted, however, that most courts addressing the question in fair representation cases had required service as well as filing within six months. App. 4a. It concluded that this Court's decision in *Del Costello* was based on the balance of interests struck by Congress in section 10(b), and that balance required both filing and service within six months. App. 6a.

Judge Gibbons dissented. In his view, neither the district court, nor any of the decisions on which the majority relied, had analyzed the question, but had merely assumed that this Court in *DelCostello* intended to require adoption of all of section 10(b), not just its limitations period. App. 9a. He declined to follow that approach for several reasons. First, he noted, section 10(b) only requires service of a simple charge filed by the injured party within six months, although a substantial amount of time may pass before the respondent learns that the agency has decided that there is reason to believe that the statute was violated and

therefore will actually file a complaint against it. App. 10a. Moreover, the notice functions performed under the NLRA by section 10(b)'s service requirement are met in federal court by Rules 4(a) and 4(j) of the Federal Rules of Civil Procedure, which assure prompt service. App. 10a-11a. Thus, although it was necessary to turn to section 10(b) to "borrow" a statute of limitations to fill a gap in federal law, Judge Gibbons concluded that there is no gap in federal law—and thus no need to borrow any rules—regarding the end of the running of the statutory period. App. 12a. Finally, Judge Gibbons observed that by adhering to the requirements of the Federal Rules, and not adopting the rest of section 10(b), the courts would maintain a uniform federal procedure and decrease uncertainty by establishing an easily ascertainable point to measure the ending of the limitations period. App. 11a-12a.

REASON FOR GRANTING THE WRIT

THE DECISION BELOW INVOLVES AN IMPORTANT QUESTION OF LAW WHICH REQUIRES RESOLUTION BY THIS COURT, AND DIRECTLY CONFLICTS WITH DECISIONS OF OTHER LOWER COURTS.

In *DelCostello v. Teamsters*, 462 U.S. 151 (1983), this Court decided that in fair representation suits such as this, courts should borrow the six-month statute of limitations from section 10(b) of the NLRA as the most appropriate limitations period for actions of this kind. Although the length of the limitations period is now settled, the question of what event stops the running of the statute is causing substantial litigation in the federal courts and requires resolution by this Court. Thus, the decision below is in direct conflict with rulings of the Court of Appeals for the Sixth Circuit, *Macon v. ITT Continental Baking Co.*, 779 F.2d 1166 (6th Cir. 1985), *cert. pending*, No. 85-1400, and of the District Court for the Southern District of Iowa, in a case now on interlocutory appeal, *Thompsen v. UPS*, 608 F. Supp. 1244 (S.D. Ia. 1985), *app. pending*, No. 85-1830 (8th Cir., argued February 13, 1986). On

the same side as the court below are two others courts of appeals, *Simon v. Kroger Co.*, 743 F.2d 1544 (11th Cir. 1984), *cert. denied with three Justices dissenting*, 105 S. Ct. 2155 (1985), and *Gallon v. Levin Metals Corp.*, 779 F.2d 1439 (9th Cir. 1986); a district court decision now submitted for decision on appeal, *Ellenbogen v. Rider Maint. Corp.*, 621 F. Supp. 324 (S.D.N.Y. 1985), *app. pending*, No. 85-7926 (2d Cir., argued April 14, 1986); and various other district court rulings.

If this were a suit under any other federal statute, there would be no question that the statute of limitations would have been tolled by the filing of the complaint, notwithstanding the failure to obtain service for several additional weeks. Thus, outside of the fair representation area, every court of appeals which has considered the question has held that Rule 3 of the Federal Rules determines when the statute of limitations is tolled for federal claims. *Bomar v. Keyes*, 162 F.2d 136, 140-141 (2d Cir. 1947); *Moore Co. v. Sid Richardson Carb. & Gas Co.*, 347 F.2d 921, 924 (8th Cir. 1965); *United States v. Wahl*, 583 F.2d 285, 287-288 (6th Cir. 1978); *Caldwell v. Martin Marietta Corp.*, 632 F.2d 1184, 1188 (5th Cir. 1980); *Jordan v. United States*, 694 F.2d 833, 837 n.7 (D.C. Cir. 1982); *Metropolitan Paving Co. v. Operating Engineers*, 439 F.2d 300, 306 (10th Cir. 1971); 2 *Moore's Federal Practice* ¶ 3.07[4.-3-2], at 3-113 to 3-126 (1986). Although this Court has described the applicability of Rule 3 to toll the statute in federal question cases as an open question, *Walker v. Armco Steel Corp.*, 446 U.S. 740, 751 n.11 (1980), it has ruled, without adverting to *Walker*, that Rule 3 determines whether a Title VII action is commenced within the limitations period. *Baldwin County Welcome Center v. Brown*, 466 U.S. 147, 149 (1984).

The question, then, is whether *DelCostello* requires the creation of an exception for fair representation suits. The court below believed that such an exception was compelled simply because this Court did not specify that only the six-month filing requirement, and not the service requirement, was being borrowed. In fact, however, the only question presented in *DelCostello* was which limitations period to borrow, and the

Court chose a period which it believed was long enough to permit individual workers to protect their rights, without being so long as to permit grievance settlements to linger for years without becoming final. *DelCostello* cannot be read as establishing any rule regarding when the statute is tolled, not to speak of requiring a departure from the procedures applicable to other federal question cases.

In fact, *DelCostello*, suggests just the opposite. In it, this Court rejected a three-month limitations period because of the circumstances in which fair representation suits must be initiated—an unsophisticated worker, who has recently been discharged and thus lacks the resources to readily hire an attorney, must determine whether his rights have been violated and draft a complaint which meets the requirements of Rules 8 and 11 of the Federal Rules. Thus, it concluded, requiring that suits be filed within a period of time substantially less than six months could easily prevent the filing of many meritorious cases. 462 U.S. at 167. And yet, because several weeks may be required to effect service of the summons and complaint, the adoption of section 10(b)'s service requirement would force employees to file their suits well in advance of the expiration of the six-month period. Moreover, because unions are unincorporated associations which lack registered agents for service of process, they are served by personal delivery to an officer. If compliance with the six-month statute of limitations depends on completion of such personal service, union officers would have every incentive to be "out of the office" any time a process server appeared. Thus, applying the NLRA service rule to federal court complaints could so shorten the effective time to file as to seriously endanger the vindication of employee rights *vis-a-vis* their unions and undermine the "bulwark to prevent arbitrary union conduct" crafted by this Court in *Vaca v. Sipes*, 386 U.S. 171, 182 (1967). *Macon v. ITT Continental Baking Co.*, 779 F.2d 1166, 1171 (6th Cir. 1985); *Simon v. Kroger Co.*, 105 S.Ct. 2155, 2156 (1985) (per Justices White, Brennan, and Marshall, dissenting from the denial of certiorari).

Moreover, service upon the union will frequently be effected

at a different time than on the employer, thus creating a realistic possibility that the statute will have run against one but not the other defendant in a fair representation case. In *DelCostello,* however, the Court borrowed the six-month period in section 10(b) for the very purpose of assuring that the same limitation period would apply to both halves of the case. 462 U.S. at 169 n.19. Borrowing the service requirement would thus be contrary to the underlying purpose of *DelCostello* in this way as well.

Adoption of the service requirement in section 10(b) would also presumably bring with it the Labor Board's rules on how service is to be accomplished and other related aspects of Board law. But that would eliminate the advantages of uniformity in federal civil practice, which was a principal goal of the Federal Rules of Civil Procedure. Thus, the purpose of the Rules was to have one set of procedures for every kind of case in the federal courts so that everyone concerned—judges, counsel, and parties—would have a ready point of reference to determine what was required of each of them. This objective would be undermined if a special set of rules for service were created in fair representation cases.

In *Simon v. Kroger Co.*, 105 S. Ct. 2155 (1985), three Justices explained why service should not be required within the six-month period and voted to resolve the "service v. filing" issue that was presented in that case, despite the fact that there was not yet a split in the circuits. Although some of the lower courts have taken this caution to heart, most have simply continued to assume that *DelCostello* requires application of the service requirement of section 10(b). The division among the lower courts guarantees that the question will not simply go away, and litigation of this issue is consuming increasing resources in federal district and appellate courts across the country. The division among the lower courts has now reached sufficient proportions that this Court's intervention is required. Because adoption of the rule requiring service within six months may endanger the enforceability of the duty of fair representation, the Court should accept the issue for review now, and rule that filing a complaint is sufficient to toll the statute of limitations in fair representation cases.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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May 2, 1986

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 85-5129

THOMAS WEST,

Appellant,

vs.

CONRAIL, A FOREIGN CORPORATION; BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES, LOCAL NO. 2906, A FOREIGN CORPORATION; NEW JERSEY TRANSIT, A CORPORATION OF THE STATE OF NEW JERSEY; and ANTHONY VINCENT

On Appeal from the United States
District Court for the
District of New Jersey - Trenton
(D. C. Action No. 84-3925)

Submitted Under Third Circuit Rule 12(6)
December 6, 1985
(Filed December 31, 1985)

Before: ADAMS, GIBBONS, and STAPLETON,
Circuit Judges

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OPINION OF THE COURT

STAPLETON, *Circuit Judge*

Appellant filed a complaint with the District Court on September 24, 1984, alleging a hybrid breach of contract/breach of the duty of fair representation claim against his employer-railroad, his union, and a union representative. The parties agree, for purposes of this appeal, that the appellant's cause of action accrued on March 25, 1984. Appellant thus filed his complaint within six months of the accrual of his cause of action. Appellant, however, failed to mail his complaint to the defendants until October 11, 1984.

In *Sisco v. Conrail*, 732 F.2d 1188 (3d Cir. 1984), we held that the six-month statute of limitations period of Section 10(b) of the National Labor Relations Act applied to a claim of unfair representation brought under the Railway Labor Act, 45 U.S.C. §§ 151-188 (1976). We there followed *DelCostello v. Intl. Brotherhood of Teamsters*, 462 U.S. 151 (1983), which applied the limitations period of 10(b) to hybrid section 301/fair representation actions. The parties agree that 10(b) governs this complaint. They disagree, however, on whether service of process must occur within six months of the accrual of the cause of action or whether filing the complaint tolls the limitations period. The court below determined that both filing and service of process must be completed within six months, and consequently granted defendants' motions for summary judgment. We affirm.

Section 10(b) provides: "No complaint shall issue based upon any unfair labor practice occuring more than six months prior to the filing of the charge with the board *and the service of a copy thereof upon the person against whom such charge is made*"

(emphasis supplied). Thus, under 10(b) the filing of the complaint with the National Labor Relations Board does not toll the limitations period. Instead, a copy of the charge must also be served on the defendants within the limitations period; service may be accomplished simply by mailing the copy. *See* 29 CFR § 102.113(a) (1984). In contrast, the general rule for a federal suit is that the

> action is commenced, and the statute of limitations tolled, upon the filing of the complaint. See, *e.g.*, *Hobson v. Wilson*, 737 F.2d 1, 44 (CADC 1984); Fed.Rule Civ.Proc. 3; 2 J. Moore & J. Lucas, Moore's Federal Practice ¶ 3.07[4.-3-2] (1984). While the time for service of process is not open-ended, see Fed.Rules Civ.Proc. 4(a), 4(j), it need not occur within the limitations period.

Simon v. Kroger Co., 105 S.Ct. 2155 (1985) (White, J., dissenting from denial of *cert.*).

A majority of the courts that have addressed the question here presented have, like the court below, found that where the six month limitations period of 10(b) governs, the tolling provision of that section also applies. *See Williams v. Greyhound Lines, Inc.*, 756 F.2d 818 (11th Cir. 1985); *Dunlap v. Lockheed Georgia Co.*, 755 F.2d 1543 (11th Cir. 1985); *Simon v. Kroger Co.*, 743 F.2d 1544, *reh'g denied*, 749 F.2d 733 (11th Cir. 1984), *cert. denied*, 105 S.Ct. 2155 (1985); *Howard v. Lockheed Georgia Co.*, 742 F.2d 612 (11th Cir. 1984); *Ellenbogen v. Rider Maintenance Corp.*, No. 84 Civ. 3513 (RLC), slip op. (S.D.N.Y. Oct. 28, 1985); *Waldron v. Motor Coils Manufacturing Co.*, 606 F.Supp. 658 (W.D. Penn. 1985); *Thompson v. Ralston Purina Co.*, 599 F.Supp. 756 (W.D. Mich. 1984); *Hoffman v. United Markets, Inc.*, 117 L.R.R.M. 3229 (N.D. Cal. 1984). *But see Simons v. Kroger Co.*, 105 S.Ct. 2155 (1985) (White, J., dissenting from denial of

cert.); *Thomsen v. United Parcel Service*, 608 F.Supp. 1244 (S.D. Iowa 1985); *LaTondress v. Local No. 7, I.B.T.*, 102 F.R.D. 295 (W.D. Mich. 1984); *Williams v. E.I. Dupont de Nemours Co.*, 581 F.Supp. 791 (M.D. Tenn. 1983).

In *Sisco* we found that 10(b) "represents Congress' evaluation of the appropriate balance of interests between the need for prompt resolution of disputes on the one hand, and the interest in assuring adequate representation of employees on the other." *Sisco*, 732 F.2d 1188, 1193. Similarly, in *DelCostello* the Supreme Court stated:

> At least as important as the similarity of the rights asserted in the two contexts, however, is the close similarity of the considerations relevant to the choice of a limitations period. As Justice Stewart observed in (*United Parcel Service, Inc. v. Mitchell*):
>
> > "In § 10(b) of the NLRA, Congress established a limitations period attuned to what it viewed as the proper balance between the national interests in stable bargaining relationships and finality of private settlements, and an employee's interest in setting aside what he views as an unjust settlement under the collective-bargaining system. That is precisely the balance at issue in this case...'[t]he need for uniformity' among procedures followed for similar claims...as well as the clear congressional indication of the proper balance between the interests at stake, counsels for adoption of § 10(b) of the NLRA as the appropriate limitations period for lawsuits such as this." (451 U.S. at 70-71)(footnote omitted).

Delcostello, 462 U.S. at 170-71 (quoting *Mitchell*, 451 U.S. 56, 70-71 (1981)(Stewart, J., concurring)).

The balance struck by Congress and recognized in *DelCostello* is reflected in the language of 10(b), which unambiguously requires both filing *and* service of process within six months of the accrual of the cause of action. We are reluctant to upset that balance by grafting Fed. Rule Civ. Proc. 4(j) onto 10(b), particularly since doing so would increase the time limit for initiation of the dispute resolution process from six to ten months, a substantial addition.

While it is true, as Judge Gibbons notes, that the complaint in an unfair labor practice proceeding is filed by the General Counsel after an investigation of the employee's charge, it is the filing and service of the charge that notifies the employer of the charge and initiates the dispute resolution process in such a proceeding. The filing and service of the complaint performs the same function in a hybrid labor suit like the one before us. Section 10(b) promotes the prompt resolution of labor disputes by requiring an early initiation of the dispute resolution process and *DelCostello* teaches that this policy should be implemented in hybrid labor suits as well. That policy is best served by borrowing the service requirement, as well as the filing requirement, of Section 10(b).

The final order of the district court will be affirmed.*

GIBBONS, *Circuit Judge*, dissenting:

Thomas West appeals from an order dismissing his suit against his employer and union, alleging that the employer had breached the collective-bargaining

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* Appellant also contends that application of the tolling provision denies him equal protection of the law. We are unpersuaded.

agreement and that the union had breached its duty of fair representation. The district court dismissed because service of process had not been completed before the running of the applicable statute of limitations.

Both breaches were claimed to be violations of the Railway Labor Act, 45 U.S.C. §§ 151-188 (1982). In *DelCostello v. International Brotherhood of Teamsters*, 462 U.S. 151 (1983), the Supreme Court held that the applicable statute of limitations for such hybrid suits under the National Labor Relations Act, 29 U.S.C. §§ 151-169 (1982), was the six-month limitation found in section 10(b) of the National Labor Relations Act, 29 U.S.C. § 160(b) (1982). As Judge Stapleton notes, this court, following the reasoning of *DelCostello*, has applied section 10(b)'s six-month limitation period to hybrid Railway Labor Act cases. *See Sisco v. Consolidated Rail Corp.*, 732 F.2d 1188, 1193 (3d Cir. 1984). The issue presented on this appeal is whether section 10(b)'s additional requirement that service of process be completed within the six-month period is also applicable to a hybrid breach of contract/breach of fair representation suit brought in federal district court.

The pertinent facts of this case are not in dispute. Thomas West, the plaintiff, was fired by Consolidated Rail Corporation on November 27, 1981, after four bottles of beer were discovered in a truck that West had been riding in. West disclaimed knowledge of the alcoholic beverages and requested his union, the Brotherhood of Maintenance of Way Employes, to appeal his grievance. For the next twenty-eight months the union gave West a variety of excuses for not processing his appeal. Finally, on March 25, 1984 West discovered that the union official responsible for his appeal was not pursuing the matter, and that there was little chance that his grievance appeal would be

acted on. West, therefore, filed suit against his employer and union in the United States District Court for the District of New Jersey. Although the suit was filed within six months of West's alleged discovery of the inaction by his union (September 24, 1984), copies of the complaints and summonses were not mailed until October 10, 1984, and the various defendants did not receive those documents until sometime between October 12th and October 22nd. Holding that at best the six-month limitations period expired on September 25, 1984, the district court concluded that section 10(b) of the National Labor Relations Act required both filing and service within six months, and it dismissed the complaint as time-barred.

Hybrid claims for breach of contract/breach of duty of fair representation are federal causes of action. *See Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554, 561-64 (1976). While breach of contract claims against employers are expressly provided for in the Labor Management Relations Act, 29 U.S.C. § 185 (1982), breach of duty of fair representation claims against unions are implied from the Railway Labor Act and the National Labor Relations Act. *See Steele v. Louisville & Nashville Railroad*, 323 U.S. 192, 202 (1944); *Vaca v. Sipes*, 386 U.S. 171, 190 (1967). Because there is no federal statute of limitations expressly applicable to such suits, the Supreme Court "borrowed" the six-month period of section 10(b) of the National Labor Relations Act as the closest analogous time bar. *See DelCostello*, 462 U.S. at 158. In making such a "borrowing" the question arises whether the Court intended to borrow just the period itself or the period along with its requirement of filing and service.

The district court, relying on two decisions by the Court of Appeals for the Eleventh Circuit, *see Simon v. Kroger Co.*, 745 F.2d 1544 (11th Cir. 1984), *cert. denied*, 105 S. Ct. 2155 (1985); *Howard v. Lockheed-Georgia*

Co., 742 F.2d 612 (11th Cir. 1984), and a decision by a district court in California, *see Hoffman v. United Market Inc.*, 117 LRRM 3229 (N.D. Cal. 1984), concluded that the *DelCostello* Court had adopted both the section 10(b) six-month period and its filing and service requirements. *See West v. Conrail*, No. 84-3925 (D.N.J. Feb. 4, 1985) (opinion read into transcript), *reprinted in* Joint Appendix at 16, 22. Neither the district court nor the decisions it and the majority rely upon, however, analyzed the question further than to make this assumption of complete adoption.[1] *See West*, No. 84-3925, reprinted *in* Joint Appendix at 22-23; *Simon*, 743 F.2d at 1546; *Howard*, 742 F.2d at 614; *Hoffman*, 117 LRRM at 3230.

Section 10(b) of the National Labor Relations Act establishes the procedural mechanism for instituting and prosecuting an unfair labor practice complaint before the National Labor Relations Board, 29 U.S.C. § 160(b). Under this section, an aggrieved person may initiate a charge with the Board, *see* 29 C.F.R. § 102.9 (1985), but only the Board's General Counsel, after investigation, is empowered to issue and prosecute a complaint. *See* 29 U.S.C. § 153(d) (1982). When first enacted in 1935, the National Labor Relations Act contained no time period within which a charge had to be filed. *See* National Labor Relations Act, ch. 372, 49 Stat. 449, 453-54. Consequently, long delays between the alleged unfair labor practice and filing of the charge

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1. Defendants-Appellants cite two other cases that have held that *DelCostello* impliedly required both filing and service within the six-month period. *See* Dunlap v. Lockheed-Georgia Co., 755 F.2d 1543 (11th Cir. 1985); Thompson v. Ralston Purina Co., 599 F. Supp. 756 (W.D. Mich. 1984). Both of these cases, however, simply follow the earlier Eleventh Circuit decisions without further analysis. *See Dunlap*, 755 F.2d at 1543-44. *Thompson*, 599 F. Supp. at 758.

were allowed. *See Phelps Dodge Corp. v. NLRB*, 113 F.2d 202, 206 (2d Cir. 1940), *modified on other grounds*, 313 U.S. 177 (1941). With no knowledge of the unfair labor practice the General Counsel could not commence a timely investigation and a charged party would not realize that an investigation might occur. This problem was corrected by the addition of a six-month period for filing charges when the National Labor Relations Act was amended by the Taft-Hartley Act in 1947. *See* National Labor Relations Act, ch. 120, 61 Stat. 136, 146. The six-month limitation, however, applies only to the filing of the charge, not the issuance of the complaint. *See NLRB v. Complas Industries, Inc.*, 714 F.2d 729, 732 (7th Cir. 1983); *Proctor & Gamble Manufacturing Co. v. NLRB*, 658 F.2d 968, 985 (4th Cir. 1981), *cert. denied*, 459 U.S. 879 (1982). Thus section 10(b) is not, technically, a statute of limitations. It does not determine when the government, which alone may prosecute an unfair labor practice charge, may do so. There can still be substantial delay between the filing of the charge and the filing of the complaint because the charge only sets the investigation in motion. *See NLRB v. Fant Milling Co.*, 360 U.S. 301, 307 (1959).

The requirement of service within the limitation period is unique to the National Labor Relations Act administrative proceedings where the General Counsel, not the complaining party, decides whether to file and prosecute the actual complaint. No analogous need is present in an action in federal district court. In federal court, Rule 3 in conjunction with Rule 4(a) and (j) of the Rules of Civil Procedure govern this situation. Rule 3 by commencing the action upon filing, and Rule 4 by assuring that the complaint and summons are promptly served upon the defendant. Hence, borrowing a service of process requirement from the administrative process in hybrid

breach of contract/breach of duty of fair representation suits is unnecessary.

More than being unnecessary, however, requiring service within the six-month period would create procedural conflicts and uncertainty. Unlike diversity suits,[2] in cases based on federal question jurisdiction, where there is no express statutory limitations period, federal courts have generally used filing pursuant to Rule 3 as the point for ending the running of the borrowed limitations period. *See, e.g., Caldwell v. Martin Marietta Corp.*, 632 F.2d 1184, 1188 (5th Cir. 1980) (filing ends the running of a statute of limitations in a section 1983 suit); *Metropolitan Paving Co. v. International Union of Operating Engineers*, 439 F.2d 300, 306 (10th Cir. 1971) (filing ended the limitations period in an action under the Labor Management Relations Act), *cert. denied*, 404 U.S. 829 ; *Ratcliffe v. Insurance Co. of North America*, 482 F. Supp. 759, 763 (E.D. Pa. 1980) (filing ends the limitations period in an Equal Employment Opportunity suit); *see also* 4 C. Wright & A. Miller, Federal Practice and Procedure § 1056 (1969).

There are two arguments for using such an approach in hybrid labor suits. First, it maintains a uniform federal procedure and decreases uncertainty by establishing an easily ascertainable point to

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2. Although the *Erie* doctrine requires that federal courts apply the state rule for satisfying a statute of limitations period in diversity cases, *see Walker v. Armco Steel Corp.*, 446 U.S. 740, 752-53 (1980), the Supreme Court has expressly distinguished and left open "the role of Rule 3 as a tolling provision for a statute of limitations, whether set by federal law or borrowed from state law, if the cause of action is based on federal law." *Id.* at 751 n.11. Unlike a diversity suit, there are no potential tenth amendment issues, and we are, therefore, free to examine the reasons arguing against adopting section 10(b)'s service requirement

measure the ending of the limitations period.[3] There is a strong forum interest in such uniformity. Second, consistent with the Supreme Court's rationale in *DelCostello*, it borrows only what is necessary to fill the gap in federal statutory law. As the *DelCostello* Court explained, "[W]e are applying a statute of limitations to a different cause of action, not because the legislature enacting that limitations provision intended that it apply elsewhere, but because it is the most suitable source for borrowing to fill a gap in federal law." 462 U.S. at 170 n.21. While there was a gap as to the length of the limitations period for breach of contract/breach of duty of fair representation suits, there was, and is, no gap as to the procedure for ending the running of the statutory period. Rule 3 serves as the controlling provision.[4] *See Metropolitan Paving Co.*, 439 F.2d at

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3. Requiring service of process within the six-month period entails the problem of determining when service was performed. The instant case presents a good example. The complaints and summonses were mailed on October 10, 1984, but the various defendants received them on October 12th, October 15th, October 20th, and October 22nd. Although the National Labor Relations Board has established the time of mailing as the controlling time in unfair labor practice proceedings, *see* 29 C.F.R. § 102.113(a) (1985), using this period in federal court would require additional "borrowing." Moreover, since mailing does not actually notify the defendant, the Board's mailing rule indicates that the real purpose of section 10(b)'s service requirement is to ensure prompt service. In federal courts, this promptness, to the degree deemed necessary, is already ensured by Rule 4(a).

4. Significantly, in applying the six-month period of section 10(b) to the two consolidated cases under consideration in *DelCostello*, the Court focused on the time of *filing* and never mentioned the time of service. *See* 462 U.S. at 172 ("In No. 81-2408, it is conceded that the suit was *filed* more than 10 months after respondent's cause of action accrued. . . . The situation is less clear in No. 81-2386. Depending on when the joint committee's decision is thought to have been rendered, the suit was *filed* some seven or eight months afterwards.") (emphasis supplied).

306; *Williams v. E.I. duPont de Nemours Co.*, 581 F. Supp. 791, 792 (M.D. Tenn. 1983).

Consequently, filing pursuant to Rule 3 should be all that is required to end the running of the six-month limitations period applicable to hybrid labor cases. The order appealed from should, therefore, be reversed and the case remanded for further proceedings.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

Civil No. 84-3925 (JWB)

TRANSCRIPT OF PROCEEDINGS

THOMAS WEST,
Plaintiff,

v.

CONRAIL, A FOREIGN CORPORATION; BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES, LOCAL NO. 2906, A FOREIGN CORPORATION; NEW JERSEY TRANSIT, A CORPORATION OF THE STATE OF NEW JERSEY; and ANTHONY VINCENT,
Defendants.

Trenton, New Jersey
February 4, 1985

BEFORE:
THE HONORABLE JOHN W. BISSELL, U.S.D.J.

This Court feels, frankly, that if and when confronted with the issue presently before the Court, and indeed it may be in Eleventh Circuit, namely Howard versus Lockheed-Georgia, Simon versus Kroger and the decision from the Northern District of California in Hoffmann v. United Markets, Inc., are the only ones that have addressed and which shed light on this issue directly. The Third Circuit, of course, has adopted the Del Costello rule as indicated, of course, in Sisco versus Conrail, and applied it to the Railway Labor Act.

This Court feels, frankly, that if and when confronted with tthe issue presently before the Court, and indeed it may be in this case, the U.S. Court of Appeals for the Third Circuit would agree with the Eleventh that if the statute is to be borrowed, it is to be borrowed in its entirety. While that may lead to some uncertainty with regard to the actual date for commencement of actions, it is not an uncertainty that can't be remedied by the establishment of a date when service is accomplished.

I realize, of course, that service of a summons and complaint in a court action is a slightly different act and process than that present in a NLRB matter. However, once again, I don't feel that it is particularly onerous and, frankly, a greater degree of confusion and uncertainty in all likelihood would result from a partial borrowing, shall we say, of Section 10(b) for purposes of filing but not for purposes of service, which I think would jeopardize the underlying thesis in Del Costello of uniformity, as Mr. Malone mentioned.

The Court accordingly grants the motion based on the statute of limitations argument. I am going to be filing with my reporter for his transcription into the Court's minutes a brief opinion disposing of this case on that ground alone. The statute of limitations issue is, of course, dispositive of the matter, requiring the dismissal of the complaint. Accordingly, the Court declines to address in an advisory capacity the other grounds for the motion.

Thank you.

* * *

This case arises out of a Complaint filed by Thomas West against his employer Conrail and Conrail's alleged successor in interest to the collective bargaining agreement in question, New Jersey Transit, alleging wrongful discharge. Also named as defendants are Mr. West's collective bargaining representative, Brotherhood of Maintenance of Way Employees, Local No. 2906 ("the Union") for breach of the duty of fair representation and Anthony Vincent, a Union representative for negligence in his representation of plaintiff. Jurisdiction of this Court was initially

premised on the Labor Management Relations Act, and pendent jurisdiction. Subsequently, the parties appear to have agreed that the Railway Labor Act 45 U.S.C. Sec. 151 *et seq.* ("RLA") is the applicable federal statute upon which to proceed.

The matter is currently before the Court on defendants' motion to dismiss the Complaint and/or for summary judgment. Plaintiff was employed by defendant Conrail as a Bridges and Buildings Mechanic from February 9, 1981 until his discharge on November 27, 1981. Plaintiff was dismissed for riding in a company truck in which four bottles of beer were found. Plaintiff contends that at no time was he aware of the existence of the alcoholic beverages in the vehicle. Upon receiving notice of his termination plaintiff contacted his union representative, defendant Vincent, and requested that the Union appeal his termination. Plaintiff was reinstated to his position, *without backpay*, on February 9, 1984.

All defendants move to dismiss the Complaint for failure to comply with the applicable statute of limitations. However, as the parties have relied upon material outside of the pleadings this motion shall be treated as one for summary judgement under Fed. R. Civ. P. 56. Specifically, the defendants contend that the plaintiff filed and served his Complaint outside the six month statute of limitations recognized by the Supreme Court in *Del Costello v. Teamsters*, __ U.S. __, 103 S.Ct. 2281 (1983), and recently applied to the Railway Labor Act in *Sisco v. Conrail*, 732 F.2d 1188 (3d Cir. 1984). Initially, the defendants contend that any cause of action for breach of the duty of fair representation had to occur on or before the date of plaintiff's reinstatement, February 9, 1984. As the Complaint was not filed until September 24, 1984, more than seven months after the reinstatement, the defendants argue the six month statute had run and accordingly, the Complaint is time barred.

In opposition, the plaintiff argues that the rule governing the running of the statute of limitations is: "a limitation period begins to run 'when the claimant discovers, or in the exercise of reasonable dilligence should have discovered, the acts constituting the alleged violation,'" *N.L.R.B. v. Allied Products*

Corp., 548 F.2d 644, 650 (6th Cir. 19). Relying on his own certification plaintiff contends that he discovered that the union was making no efforts to process his grievance only in March of 1984, and accordingly, the six month statute of limitations began to run on that day.

In reply to this argument, the defendants contend the statute of limitations in question here, namely Sec. 10(b) of the National Labor Relations Act requires not only a filing of a complaint within the period. For the sake of argument defendants are willing to accept plaintiff's contention that the statute began to run in March of 1984. They argue that even using that later date the plaintiff failed to comply with the statute because the defendants were not served until approximately October 12, 1984, or later, more than six months after any claim accrued. (This was accomplished by mail from the plaintiff pursuant to Fed. R. Civ. P. 4(c)(2)(C)(ii), no delay beyond plaintiff's control.) In support of their positions, defendants cite *Howard v. Lockheed-Georgia*, 742 F.2d 612 (11th Cir. 1984); *Simon v. Kroger Company*, 743 F.2d 1544 (11th Cir. 1984); and *Hoffman v. United Markets, Inc.*, __ F. Supp. __, 117 LRRM 3229 (N.D. Cal. 1984), all of which held that both filing and service of the complaint are required to be completed within the six month period. The express language of that statement itself permits no other conclusion.

The record presently before the Court indicates that summary judgement in favor of defendants is warranted. The statute of limitations involved herein, expressly calls for both the filing and serving of the complaint to be completed within the six month period. The Courts that have recently addressed the issue have also so held. Plaintiff failed to serve the defendants within the six month period and as such his complaint is time barred. Accordingly, it is dismissed.

As the statute of limitations issue is dispositive the Court will not address the other grounds for dismissal or summary judgement raised by the defendants.

United States Court of Appeals

FOR THE THIRD CIRCUIT

No. 85-5129

THOMAS WEST, Appellant

vs.

CONRAIL, A FOREIGN CORPORATION; BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES, LOCAL NO. 2906, A FOREIGN CORPORATION; NEW JERSEY TRANSIT, A CORPORATION OF THE STATE OF NEW JERSEY; and ANTHONY VINCENT

(D. C. Civil No. 84-3925)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

Present: ADAMS, GIBBONS and STAPLETON, *Circuit Judges*

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the District of New Jersey and was submitted under Third Circuit Rule 12(6) December 6, 1985.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, entered February 20, 1985, be, and the same is hereby affirmed. Costs taxed against the appellant.

ATTEST:

Sally Mrvos

Clerk

December 31, 1985